APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

MISSOURI PACIFIC RAILROAD COMPANY,
and others,

Appellants,

v.

GROUP OF INSTITUTIONAL INVESTORS, ETC.,
et al,

Appellees.

Appeals from the United States District Court for the Eastern District of Missouri.

Nos. 14, 264-14, 274

MOTION OF MISSOURI PACIFIC RAILROAD COMPANY TO VACATE THE JUDGMENT.

TO THE HONORABLE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT:

Comes now Missouri Pacific Railroad Company, a principal debtor in the above-entitled cause, and moves this Honorable Court to vacate and set aside the judgment heretofore made and entered in said cause on the fourteenth day of August, 1951, and to withdraw its supporting opinion rendered on the same date, for the following reasons and upon the following grounds:

1. Because the judgment is void as having been entered in violation of the Act of April 9, 1948 (11 U.S.C. § 208) and at a time when, under such Act, all proceedings were to have been suspended. Pursuant to the pro-

visions of such Act, the Group of Institutional Investors Holding First and Refunding Mortgage 5% Bonds of Missouri Pacific Railroad Company filed a petition dated July 11, 1951 (or before the entry of the judgment herein prayed to be vacated), requesting that the Interstate Commerce Commission report any changes, facts or developments which had occurred since the Commission's approval of the Plan of Reorganization which had not been provided for in the Plan and which in the opinion of the Commission made it necessary or expedient for the Commission to reexamine or reconsider and, if necessary, to revise the Plan in order to insure that, if put into effect, it should then in the opinion of the Commission be fair and equitable and in the public interest and compatible with the provisions of 11 U.S.C. § 208 and Section 77 of the Bankruptcy Act, as amended. The United States District Court, Eastern Division, Eastern Judicial District of Missouri, thereupon entered its order dated July 13, 1951, referring the petition to the Interstate Commerce Commission. The Act of April 9, 1948, expressly provides that upon the filing of such a petition "all further proceedings for confirmation of the plan shall be suspended pending disposition of the petition by the Commission * * *." (11 U.S.C. § 208(a)(5))

A memorandum of points and authorities in support of this motion is attached.

MISSOURI PACIFIC RAILROAD COMPANY

By /s/ (EDWARD K. WHEELER)
EDWARD K. WHEELER
Its Attorney

Of Counsel:
WHEELER & WHEELER
704 Southern Building
Washington 5, D. C.

Dated: October 17, 1951

AFFIDAVIT OF SERVICE

I hereby certify that copies of the foregoing motion, and of the attached memorandum of points and authorities in support thereof, were served upon counsel for all parties of record.

/s/ (EDWARD K. WHEELER)
EDWARD K. WHEELER

Washington, D. C.
October 17, 1951

APPENDIX B

TESTIMONY OF T. C. DAVIS, CHAIRMAN OF THE BOARD, MISSOURI PACIFIC RAILROAD COMPANY BEFORE THE INTERSTATE COMMERCE COMMISSION ON DECEMBER 3, 1951

The plan of reorganization certified to the court in December, 1949, carried an effective date of January 1, 1948, and was largely predicated on the balance sheet figures of December 31, 1947. The principal of stocks and bonds outstanding at that time and the interest accumulations to that date were provided for in the plan or otherwise disposed of.

The consolidated balance sheet for MOP, NOT&M and IGN as of December 31, 1947, after writing off the MOP investment in NOT&M and IGN plus the investment of NOT&M in IGN and assuming the issuance of new securities provided by the plan plus the use of cash, shows an uncapitalized surplus of $127,082,036.

In other words, the balance sheet of the new company as of January 1, 1948 would show a surplus of $127,082,036. In this setup, the NOT&M, even though admitted by the ICC in its report to be worth $83,700,000,

as a separate company, is capitalized at approximately $44,000,000 in the pending plan.

Furthermore, assets of the MOP are carried at book value, in many cases based on acquisition cost of more than 20 years ago. In cases where acquisitions have proven unprofitable or unsound, such properties have in several instances been written off. On the other hand, those properties that have proven profitable have not been written up to their true value. For instance, the American Refrigerator Transit with a surplus in excess of $20,000,000 is still carried on the MOP books at $378,300. MOP owns 71 per cent of that company and its surplus, represented by cash, properties and earning power.

Another example is the ownership of Texas and Pacific, carried on the books of MOP at $25,557,744, of which $23,000,000 is in preferred stock. This preferred is absolutely worth par and could readily be retired by the T&P through the use of its surplus cash and/or the sale to the public of T&P debentures, and this would serve to lessen the tax requirement of T&P.

The trustee could readily exercise his control of T&P to accomplish this.

Cash received would accrue to the first and refunding bonds and should be paid to these bondholders in liquidation of their claim. The retirement of the T&P preferred would in no way affect the control of that property by MOP, as the latter would continue to own a 59 per cent interest in T&P by virtue of the common stockholding.

T&P surplus as of December 31, 1950 was $80,416,073 and this is 59 per cent owned by MOP. It seems probable that this surplus item will approximate $85,000,000 by the end of 1951. I am sure I am too conservative.

In these two subsidiaries alone there is now more than $100,000,000 of surplus largely belonging to MOP and for which only the value of $2,233,044 is considered in this proposed reorganization plan.

A consolidation of the balance sheets of Missouri Pacific, NOT&M and IGN as of December 31, 1947 shows a deficit surplus account of $35,658,572. This is not a true deficit as the actual values of MOP investments in subsidiaries other than NOT&M and IGN are not considered at their real value.

However, this is the basis for the pending reorganization plan. Applying this balance sheet to the new company which means the cancellation of old securities and the issuance of new as provided in the plan, there would remain a surplus, uncapitalized of approximately $127,082,036, as of that date. If it is the intention of the ICC to write off these values and restate them at the hypothetical value set up by the ICC in its report, the company and its security holders would suffer a very severe tax loss. On any sound approach to the reorganization of the system and the issuance of new securities, the old capitalization must stand.

Now let's see what has happened since this plan was formulated with an effective date of January 1, 1948.

The consolidated balance sheet of Missouri Pacific, NOT&M and IGN for the year ending December 31, 1950, shows earned surplus of $11,449,366 and this includes a deficit surplus of the IGN amounting to $20,869,482. The improvement in the consolidated surplus for the three year period amounts to $47,107,938. In other words, we go from a deficit position of approximately $35,000,000 to a credit surplus of approximately $11,500,000 or a net increase of some $47,000,000.

And I would like to say that I am talking about earned surplus not total surplus, because these figures differ

materially, and a comparison would be even stronger in my standpoint.

Applying the issuance of new securities to the 1950 balance sheet and including all accruals on securities to be issued, we find a surplus of $176,903,261 uncapitalized. Now I am talking about the 1950 balance sheet. In other words, this surplus is readily usable for the satisfaction of the claims of the preferred and common stockholders and should be so used. The bond claims have already been satisfied.

During the period from January 1, 1948 to January 1, 1951, the trustee has spent for road—taking road at net—and equipment the sum of $110,832,619, and for equipment alone $82,431,769.

Mr. Boyden, I would like to say here, these figures are all taken from the published figures, and not taken from the exhibits put in here. There may be some difference in those, because I don't know what subsidiaries were included in the figures in the exhibits. These are taken from the Price Waterhouse audits, and are conclusive.

A substantial portion of the money spent for equipment has not been financed and the actual cash cost for the purchase of equipment amounted to $38,581,221. The amount financed equalled $43,850,548. There has been spent for retirement of equipment obligations during this period, $15,263,072. Actually, the trustee has, during this period made a cash outlay for equipment, the sum of $53,844,293. Notwithstanding this severe drain on the cash resources of the railroad, cash has again reached the staggering proportion of more than $105,000,000.

The Commission, the trustee, and in fact everyone connected in any way with this reorganization knows full well that the NOT&M is entirely solvent. In fact, as before stated, the ICC has indicated that the reorganization of the NOT&M alone is capitalizable at $83,700,-

000. This road has outstanding approximately $40,000,000 of bonds and owes a claim to the Missouri Pacific of approximately $10,000,000. The interest accrual on this claim of about another $10,000,000.

Alleghany, recognizing the soundness of the NOT&M, offered to finance the claim to the extent of $20,000,000, but the trustee declined to discuss the matter on the ground that a plan of reorganization was before the court.

* * * *

The surplus deficit shown for NOT&M in the December 31, 1947 balance sheet is misleading and is entirely refuted by the Price-Waterhouse audits. An exhibit filed in these proceedings shows that surplus as of September 30, 1951 stands at $15,773,183.

The only possible problem in this reorganization is the IGN but there again we find MOP advances to it drawing interest and affecting this road's surplus while at the same time the trustee has written off on the books of the Missouri Pacific the entire value of this claim amounting to $2,748,218. On the books of the IGN this same claim is carried as a debt and there has been accumulated to December 31, 1950 $2,427,924 of interest.

The IGN thus acknowledges its debt to MOP in the sum of $5,222,016. Thus, the interest accrual on the NOT&M books and on the IGN books has not been picked up on the books of the Missouri Pacific. The total of this interest alone is in excess of $13,000,000 and with the principal of the claims now amounts to more than $25,000,000.

In other words, this system reorganization penalizes the Missouri Pacific by more than $25,000,000 of debt owed it by NOT&M and IGN. These debts plus the investment in NOT&M common amount to $42,000,000. Think of it, these assets, belonging to the MOP stock-

holders are blithely written off in this system reorganization.

The first mortgage bonds of the IGN can easily be serviced by the railroad and there is no cause or reason for the first mortgage bondholders of the IGN to suffer the loss which this plan inflicts upon them. These bonds are entirely sound. It is incomprehensible that the committee representing the first mortgage bondholders of the IGN permit, let alone support the present reorganization plan.

However, this committee did suggest that the IGN be reorganized separately. The solution of this problem of reorganization can be found in the separate reorganization of these three corporations. Let me add now that under any reasonable reorganization of these three properties, the Missouri Pacific will not lose control of the NOT&M nor the IGN, but MOP's investment in these companies will properly be reflected in the assets of the parent company and these values will accrue to the stockholders. In my opinion, it is fraudulent to perpetrate upon the stockholders of the Missouri Pacific this obvious appropriation of their assets. The cloak of reorganization cannot disguise this appalling abuse of MOP stockholders.

In other words, there is absolutely no excuse to set up a system reorganization of these properties when it is a well known fact that in doing so the Missouri Pacific stockholders must and will be severally penalized.

There is no reason to ask the IGN first mortgage bondholders to give up their prior claim. They should obtain complete satisfaction for the accruals and the principal of their bonds. This first mortgage bond is more than adequately secured and earnings are more than ample to service this debt.

There is no sound reason why any Missouri Pacific security holder should be required to sacrifice his position or his equity in the securities he owns.

When the pending plan was written, the December 31, 1947 balance sheet of the Missouri Pacific alone indicated a surplus deficit of $17,192,835. As of December 31, 1950, this same balance sheet indicated a credit surplus of $17,670,037, and as of September 30, 1951, had reached the sum of $23,138,172. This is obviously a change of some $40,000,000 in a period of three years.

The 1950 surplus addition exceeded $17,000,000. I would like to point out that these figures do not reflect the assets and earnings of the company's important subsidiaries. From December 31, 1947 to December 31, 1950, the investments in road and equipment increased from $616,276,859 to $679,426,620 or $63,148,761. Of this increase, equipment alone accounted for $44,935,932. The cash was $46,308,498 on December 31, 1947, and stood at $61,289,695 as of December 31, 1950. The actual cash on hand as of October 26, 1951 of the Missouri Pacific Railroad alone was $90,815,183.

In this connection, I would like to point out that the trustee has expended for equipment the sum of $58,587,416 during this period and $29,575,036 spent for equipment was financed. I am talking about the Missouri Pacific property now, and talking about it alone.

The trustee actually spent MOP cash for or on account of equipment during this period the sum of $41,513,918 (including equipment obligations retired of $10,552,546).

The total assets of the Missouri Pacific Railroad Company alone and again without reflecting the true value of its investment and its interest in the cash and surpluses of subsidiaries, stood at $695,320,663 as of De-

cember 31, 1947, and $767,396,948 at the end of 1950. Changed conditions? Just an increase of $72,000,000 in this item alone.

Furthermore, the trustee has acquired since December 31, 1947, $820,000 par value of serial 5¼'s, $1,105,000 of central branch first mortgage bonds, and $1,699,000 par value of bonds of the Cairo & Thebes, or a total of $3,629,000 of par value of bonds. Actually, this represented considerably more in claims against the railroad for there was much accumulated interest.

Missouri Pacific assets, as of December 31, 1950, were carried on its books at $767,263,137. However, the consolidated statement of Missouri Pacific with its subsidiaries shows total assets of $1,354,273,553 before intercompany eliminations and total assets of $1,197,128,620 after such elimination.

• • • •

This figure has been substantially increased during 1951. I cite that because I have seen certain exhibits here that have been placed in the record bringing the proportions of earnings and other things up to September 30 I think there can be no doubt about that.

This consolidated statement shows total assets of $1,364,273,553. I just wanted to compare that with the assets which were included or used in formulating this plan, and those assets were $695,320,662, as heretofore quoted on another page ahead of this.

Here is a company with assets of more than $1,200,000,000—good, sound assets—with huge pools of new equipment—with road properties modernized and in excellent shape—with cash resources in excess of $150,000,000—and this plan offers to recapitalize these properties at $512,429,635.

I want to say here I am talking about MOP alone. This capitalization provides approximately 44 million for

the NOT&M, and 56 million for the IGN, or approximately 100 million dollars.

This statement indicates capital and surplus of $294,-138,541. If we substitute the new securities to be issued under this plan for those now existing, we will increase this capital and surplus account by $158,000,000, thus bringing the consolidated capital and surplus account of the Missouri Pacific Railroad Company, on a consolidated basis, to a figure in excess of $450,000,000.

For the year 1950, these properties earned, after taxes, available for fixed charges (but after eliminations) $57,-116,723. After providing for fixed charges there remained $30,699,077 of earnings. Further deductions of amounts required for special funds brought net earnings down to $29,543,443. Of this latter amount $4,123,955 represented the equity of stockholders of subsidiaries other than the Missouri Pacific.

The remaining total of earnings amounting to $25,-419,488 represents the equity of the stockholders of the Missouri Pacific in these earnings, and just to show how ridiculous this whole situation is—the earnings accruing to the common stock of the Missouri Pacific for the year 1950—on the basis of the old capitalization—amounted to more than $26 per share.

Yet, the Commission insists that Missouri Pacific common is worthless. I recall that the common stock of the St. Louis, Southwestern (Cotton Belt) was also considered by the Commission and the same court to be worthless and yet it is now selling around $240, per share.

The increase in mail pay recently granted the railroads amounts to roughly 32 percent plus certain terminal charges. I am sure the railroads themselves do not know exactly how this increase is going to work out as yet, but there is a very substantial increase here. The

Missouri Pacific System received for 1950 the sum of $10,672,099 for carrying mail. Actually, the System reported $14,717,399 but $4,045,300 covered the period of 1947-49.

For the nine months ending September 30, 1951, the system reports income from mail of $7,411,934. Adding an estimate for the fourth quarter of $2,500,000, which I believe is really too conservative, it appears that mail revenue for 1951 for the system will certainly reach $9,911,934.

The increase granted should therefore exceed $3,171,000 which will serve to increase the earnings by that figure. Mr. Peet agreed in his testimony that $2,900,000 would be about right. I think it is important to think of this thing in the light of the service on debt. This money would service 80 million of bonds at four percent.

Inasmuch as the Missouri Pacific has suffered certain flood losses during 1951, the charge to income for which has amounted to $2,237,000 to September 30, it is apparent that this increase comes at an opportune moment. The gross income for the system for 1951 will therefore exceed $13,000,000 of revenue for handling mail.

In 1947 the system received $6,041,828. Here is another change in conditions affecting the income of the Missouri Pacific—an increase of $7,000,000 of income since 1947. And may I point out that there is nothing temporary about this nor will the gross of $13,000,000 mail pay be affected by weather conditions. What I am thinking of is this citrus discussion here. With the steady increase in population and industrial growth in the area served by the Missouri Pacific, gross receipts from mail should continue its upward trend. The actual increase in the mail pay since December 1947, is approximately eighty percent.

Now, about the future earnings of the Missouri Pacific.

Mr. Peet in his testimony here, agreed that under certain assumptions (those now prevailing), as I understood it, the Missouri Pacific System should earn $43,000,000 in 1952. Of course, this does not include the earnings of subsidiaries wholly or partially owned by MOP and not included in the published statements, to which it is entitled.

Is it not about time that we all take a realistic view of the earnings of this railroad. In financial circles, any banker will finance a company on such a ten year record of earnings. However, there are certain people here who want to go back twenty years—to the "dust bowl" days—in order to forecast the future earnings of these properties.

Does anyone doubt that we have a different economy than that existing twenty years ago? Why not approach this problem from where we are today and where we believe we are going Certainly the past is now so distorted by permanent economic changes that we must look to the future. Why should we modernize and dieselize if we are going to return to the "dust bowl" days. Suppose Nebraska ships less wheat—you don't believe that Nebraska is going to stand still, do you? Nebraska will produce and ship other products to compensate for her wheat decline.

The Missouri Pacific Railroad is fortunate that it serves these eleven states where initiative and determination still thrive. This is much more important than a temporary decline in a wheat crop.

In all of the cases the railroads have presented to the Commission requesting higher rates, the Commission has found that the percentage of increased rates finally granted were adequate to cover the higher cost. The

Commission has presumably satisfied this situation by granting increases sufficient to meet the increase in wages and prices. It is only reasonable to assume the Commission will continue to solve this problem.

There is no reason for bondholders or stockholders to be sacrificed. This plan should be recalled at once and if the debtor were permitted to sit down with this Commission, a realistic reorganization of these properties could be worked out quickly. We are no longer in need of Section 77.

The New Orleans, Texas & Mexico Railway is solvent.

The Missouri Pacific Railroad is solvent.

The International-Great Northern R. R. can be reorganized separately.

What we do need and require is a "straight from the shoulder" solution through the application of the Mahaffie Act.

The real assets of the Missouri Pacific, revealed here today for the first time, clearly show that the Missouri Pacific Stock is no more worthless than was the "Cotton Belt" stock when so declared by the Commission in the reorganization plan for that railroad.

Office - Supreme Court, U. S.
FILED
FEB 9 1952
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 528.

MISSOURI PACIFIC RAILROAD COMPANY,

Petitioner,

v.

GROUP OF INSTITUTIONAL INVESTORS HOLDING FIRST AND REFUNDING MORTGAGE 5% BONDS OF MISSOURI PACIFIC RAILROAD COMPANY, *et al.*,

Respondents.

BRIEF FOR RESPONDENT MANUFACTURERS TRUST COMPANY, AS CORPORATE TRUSTEE UNDER THE FIRST AND REFUNDING MORTGAGE OF MISSOURI PACIFIC RAILROAD COMPANY, IN OPPOSITION.

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Dated: New York, N. Y., February 7, 1952.

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Record references in this brief are as follows:

C. R. = Transcript of proceedings in Cause No. 14,256 and Causes Nos. 14,264-14,274 in the Court of Appeals for the 8th Circuit.

1951 R. = The printed record filed in said United States Court of Appeals in Causes Nos. 14,264-14,274.

1946 R. = The record on appeal filed with said Court of Appeals in the appeals numbered 13,367-13,369, both inclusive, and 13,371-13,373, both inclusive.

1941 R. = The record on appeal filed with said Court of Appeals in the appeals numbered 12,130-12,136 inclusive.

D. R. = The Fourth Supplemental Report and Fifth Supplemental Report and Order of the Interstate Commerce Commission approving the plan of reorganization of Missouri Pacific Railroad Company and affiliated debtors.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 528.

MISSOURI PACIFIC RAILROAD COMPANY,
Petitioner,

v.

GROUP OF INSTITUTIONAL INVESTORS HOLDING FIRST AND REFUNDING MORTGAGE 5% BONDS OF MISSOURI PACIFIC RAILROAD COMPANY, *et al.*,
Respondents.

BRIEF FOR RESPONDENT MANUFACTURERS TRUST COMPANY, AS CORPORATE TRUSTEE UNDER THE FIRST AND REFUNDING MORTGAGE OF MISSOURI PACIFIC RAILROAD COMPANY, IN OPPOSITION.

Opinions Below.

The opinion of the District Court is reported at 93 F. Supp. 832 (E. D. Mo. 1950). The opinion of the Court of Appeals for the Eighth Circuit (C. R. 14-36)* is reported at 191 F. 2d 265 (8th Cir. 1951).

The Fourth and Fifth Supplemental Reports of the Interstate Commerce Commission (D. R. 28469, 28640) are reported at 275 I. C. C. 59, 203. The Plan of Reorganization is at D. R. 28689-760.

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* A list of abbreviations and references used in this brief is on page ii, *supra*.

Jurisdiction.

The jurisdictional requisites are set forth in the Petition.

Questions Presented.

1. Whether the District Court performed the duties imposed upon it by Section 77 (e) of the Bankruptcy Act, 11 U. S. C. §205(e), when it approved the Plan of Reorganization for the Missouri Pacific Railroad System certified to it by the Interstate Commerce Commission.

Respondent respectfully refers this Court to its brief in No. 525, *Alleghany Corporation* v. *Group of Institutional Investors, etc.,* for its argument on this question.*

2. Whether the filing of a petition with the District Court pursuant to 11 U. S. C. §208(a) (1) which suspends "all further proceedings for confirmation of the plan" also suspends the proceedings for approval of a plan of reorganization.

Statutes Involved.

The pertinent provisions of 11 U. S. C. §208(a) and Section 77 of the Bankruptcy Act are set forth in the Petition at pp. 3-9.

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* Petitioner has attached as Appendix B to its Petition some of the testimony of its witness, T. C. Davis, at hearings held pursuant to 11 U. S. C. §208(a)(1) before the Interstate Commerce Commission, from November 27 to December 3, 1951. Those hearings were to determine whether any "changes, facts, or developments" have occurred since the approval of the Plan which were not provided for in the Plan and which make it necessary for the Commission to re-examine it. A record of over 1,250 pages was made and more than 150 exhibits were received. Much of this material contradicts the facts and conclusions testified to by Mr. Davis.

Respondent respectfully submits that this Court's action should be based on the evidence in the record before it, which does not include any of the testimony or exhibits received at those hearings before the Commission. While respondent does not believe that any changes have occurred since the approval of the Plan which require its reconsideration by the Commission, it submits that the proper forum for the determination of that question is the Interstate Commerce Commission, and the Commission is now in the process of making that determination.

Statement.

On October 30, 1950, the United States District Court for the Eastern District of Missouri entered its Order No. 3571 approving the Plan of Reorganization for the Missouri Pacific System certified to it by the Interstate Commerce Commission (93 F. Supp. 832).

On July 11, 1951 various parties to these reorganization proceedings filed a petition with the District Court, pursuant to 11 U. S. C. §208(a) requesting that the Interstate Commerce Commission be directed to report to the Court

> "any changes, facts, or developments which have occurred since the approval of such plan by the Commission, which were not provided for in the plan, and which in the opinion of the Commission make it necessary or expedient for the Commission to reexamine or reconsider and, if necessary, to revise such plan * * *."

On July 13, 1951, the District Court referred this petition to the Commission which ordered a public hearing for November 27, 1951. These hearings were held from November 27 to December 3, 1951 before a Trial Examiner who will receive briefs on February 12, 1952, and thereafter prepare his report which will be considered by the Commission.

On August 14, 1951, the Court of Appeals for the Eighth Circuit unanimously affirmed the order of the District Court approving the Plan of Reorganization. Two of the appellants in that Court, the State of Texas and James B. Morris *et al.*, filed petitions in this Court on November 7, 1951, for writs of certiorari to review that decision of the Court of Appeals (*State of Texas* v. *Group of Institutional Investors etc.*, No. 416; *James B. Morris, et al. v. Group of Institutional Investors, et al.*, No. 415). Other appellants had obtained orders from this Court extending their time to

file petitions for writs of certiorari to and including January 11, 1952 (Nos. 524-528).

On January 2, 1952 this Court denied certiorari in No. 416, and on January 28 this Court denied certiorari in No. 415.

Argument.

11 U. S. C. §208,* enacted on April 9, 1948, makes it clear that the Interstate Commerce Commission or the District Court may determine whether relevant facts and conditions which affect the fairness or equitability of a reorganization plan have changed since the approval of the Plan by the Commission and before final confirmation of the Plan by the Courts. Its sole purpose was to "correct a situation which has heretofore prevented reconsideration of a reorganization plan years after it first had been promulgated. It does this by placing the duty upon the Commission under prescribed conditions and circumstances, of reporting current facts and conditions surrounding a railroad which might alter or affect provisions of a reorganization plan prepared years before." Sen. Rep. No. 897, 80th Cong., 2d Sess. (1948) 2.**

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* Section 208 is §3 of Public Law No. 478, 80th Cong., 2d Sess. (April 9, 1948), 62 Stat. 162, 167. Sections 1 and 2 of Public Law 478 amend Part I of the Interstate Commerce Act by adding a §20b which establishes a voluntary extrajudicial procedure whereby a railroad carrier may make alterations and modifications in its securities merely by obtaining the approval of the Interstate Commerce Commission and the consent of a specified percentage of the security holders to be affected. See 48 Col. L. Rev. 689, 690 (1938). As originally passed by the House of Representatives, Public Law 478 contained only these two sections. Section 3, now 11 U. S. C. A. §208, was a Senate amendment. See Senate Report No. 897, 80th Cong., 2d Sess. (1948) 7.

** "* * * Commission representatives have testified that under existing section 77 procedures, it has no authority to volunteer advice to the court that relevant facts and conditions which affect the fairness or equitability of a reorganization plan have changed * * * The Committee believes that the law should be clarified and the duty of the Commission made plain."

Upon the filing of a petition under 11 U. S. C. §208(a)(1) "all further proceedings for confirmation of the plan shall be suspended pending disposition of the petition by the Commission and certification of its action thereon to the court." 11 U. S. C. §208(a)(5). The Senate Report said that this subsection:

> "is also a procedural provision to make certain that petitions alleging new facts or developments must be filed with the court and referred to the Commission. Such action apprises the court of the legal action taken under the new law and suspends further action by the court involving confirmation of the old reorganization plan. The court, of course, retains custody of the property and of the case pending action and report by the Commission." Sen. Rep. No. 897, p. 8.

I.

Section 208 does not suspend this proceeding for approval of the plan.

There is a clear distinction in Section 77 between proceedings for approval of a plan and proceedings for confirmation of a plan. The first paragraph of subsection (e) provides the standards under which "the judge shall approve the plan," while the third paragraph of subsection (e) provides the standards by which "the judge shall confirm the plan." Only "upon confirmation by the judge" are the provisions of the plan "binding upon the debtor, all stockholders thereof . . . and all creditors." And it is only after confirmation that the new corporation has power to carry out the terms of the plan and to issue securities, assume obligations, transfer property, etc. "to the extent contemplated by the plan." Section 77(f).

Petitioners insist that when Congress said that proceedings for confirmation of plan are suspended it just ignored this distinction between approval and confirmation. Yet in the very same Public Law which included 11 U. S. C. §208 Congress demonstrated that it understood this distinction. Section 2 of Public Law 478, 49 U. S. C. §20(b) established a voluntary extrajudicial procedure whereby a railroad could modify its financial structure (see *supra*, p. 4). Subparagraph (13) of Section 2, 49 U. S. C. §20(b)(13), provides that this extrajudicial procedure is available to a railroad in reorganization provided the reorganization court permits its use. The subparagraph then provides:

> "Upon granting of such permission, such [reorganization] proceeding, so far as it relates to a plan of reorganization, shall be suspended."

There is no warrant for ignoring the difference between the broad scope of that language and the limited scope of Section 3 of Public Law 478, 11 U. S. C. §208 (a)(5), that

> ". . . all further proceedings for confirmation of the plan shall be suspended . . ."

Petitioner's appeal to the legislative history of 11 U. S. C. §208 is subject to the same defects discussed by this Court in *Ex Parte Collett*, 337 U. S. 55, 61 (1949). First the "short answer is that there is no need to refer to the legislative history where the statutory language is clear." Second "the legislative history does not support petitioner's position." The Senate Report makes it clear that 11 U. S. C. §208 had the limited and noncontroversial* purpose of giv-

* See 94 Cong. Rec. 1687 (1948) ("The Committee on Interstate and Foreign Commerce has considered the bill. The Committee has held hearings. We have deleted from the bill every controversial point. No one, to my knowledge, objects to any provision of the bill"). See also 94 Cong. Rec. 1765 (1948).

ing the Commission a chance for a second look at its Plan in the light of developments that had occurred since its approval. The affirmance by the Court of Appeals of the District Court's approval of the Plan has not in the least affected action by the Commission under Section 208(a). The consideration by this Court of the petitions for certiorari to review that affirmance is equally irrelevant to the proceedings by the Commission under that Section.

Conclusion.

There is no reasonable basis in the language or legislative history of 11 U. S. C. §208 for Petitioner's contention that the Court of Appeals or this Court have no power to consider and review the District Court's approval of the Plan while proceedings under Section 208(a) are pending. This Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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